



May 6, 2002

Ms. Janice Mullenix
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2002-2368

Dear Ms. Mullenix:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 162265.

The Texas Department of Transportation (the “department”) received a written request for “all inspection logs” pertaining to the construction site at FM 2186 and Bushland Road in Randall County. You have submitted to this office as responsive to the request “Traffic Control Devices Inspection Reports” (the “inspection reports”) and construction “diaries,” which we assume for purposes of this ruling are responsive to the request. You contend that the submitted information is excepted from disclosure under sections 552.103 and 552.111 of the Government Code, as well as section 409 of title 23 of the United States Code.

We begin by noting that the inspection reports you submitted to this office are made expressly public under section 552.022 of the Government Code. Section 552.022 provides, in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

The inspection reports consist of “completed reports” which are expressly made public under section 552.022(a)(1). Therefore, the department may withhold the reports only if they are made confidential under other law. Although you argue that the inspection reports are

excepted under sections 552.103 and 552.111 of the Government Code, these two provisions are discretionary exceptions and therefore are not “other law” for purposes of section 552.022.¹

You also contend that the inspection reports are confidential under section 409 of title 23 of the United States Code. Section 409 provides as follows:

Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying [sic] evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

23 U.S.C. § 409. We agree that section 409 of title 23 of the United States Code consists of other law for purposes of section 552.022(a) of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). We therefore conclude that the department may withhold the inspection reports under section 409 of title 23 of the United States Code.

We now address the applicability of section 552.103 of the Government Code to the construction diaries. To secure the protection of section 552.103, a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. Open Records Decision No. 588 (1991). Additionally, the governmental body must demonstrate that the litigation was pending or reasonably anticipated as of the day it received the records request. Gov’t Code § 552.103(c). The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.*

In Open Records Decision No. 638 (1996), this office determined how a governmental body must establish reasonably anticipated litigation when relying solely on a claim letter. We

¹Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 665 at 2 n.5 (2000) (governmental body may waive litigation exception, section 552.103), 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding), 549 at 6 (1990) (governmental body may waive informer’s privilege), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions therefore do not constitute “other law” that makes information confidential.

stated that the governmental body must 1) show that it has received a claim letter from an allegedly injured party or his attorney and 2) state that the letter complies with the notice of claim provisions of the Texas Tort Claims Act, chapter 101 of the Civil Practice and Remedies Code, or applicable municipal statute or ordinance.

You have submitted to this office for our review correspondence that you characterize as a notice of claim letter addressed to the department regarding a traffic accident that occurred at the road construction site. Furthermore, you have represented to this office that the notice of claim satisfies the notice provisions provided in the Texas Tort Claims Act. Because the department received the notice of claim prior to receiving the current records request, we conclude that you have demonstrated that the department reasonably anticipated litigation regarding this matter on the day it received the records request. We further conclude that the construction diaries at issue "relate" to that litigation for purposes of section 552.103 of the Government Code. We therefore conclude that the department may withhold the construction diaries at this time pursuant to section 552.103.

In reaching this conclusion, however, we assume that the opposing parties to the litigation have not previously had access to these records; absent special circumstances, once information has been obtained by all parties to the litigation, through discovery or otherwise, no section 552.103 interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). We also note that the applicability of section 552.103 ends once the litigation or likelihood thereof has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records

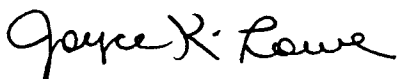
will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Joyce K. Lowe
Assistant Attorney General
Open Records Division

JKL/RWP/sdk

Ref: ID# 162265

Enc: Submitted documents

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